No. 97-704

In The

Supreme Court of the United States

October Term, 1997

PHILOMENA DOOLEY, et al.,

Petitioners,

v.

KOREAN AIR LINES CO., LTD.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONERS' REPLY BRIEF

JUANITA M. MADOLE
(*Counsel of Record*)
SPEISER KRAUSE
One Park Plaza, Suite 470
Irvine, California 92614
(949) 553-1421

Attorney for the Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

STATUTES

OTHER AUTHORITIES

SUMMARY OF ARGUMENT

In their briefs, Respondent Korean Air Lines and *Amicus Curiae,* The United States, miscast the issue presented to this Court in an attempt to align the circumstances here with those at issue in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), where the Court held that a general maritime law *death action* could not be superimposed on a Death on the High Seas Act ("DOHSA", 46 U.S.C. App. § 761, *et seq.*) death action. The issue before the Court is *not* whether common law remedies for the same kind of injury (here, death) can supplement statutory remedies specifically granted by Congress, as in DOHSA. All parties agree that such a common law action for the same injury is forbidden because it would change the statutory remedy created by Congress in a manner inconsistent with what Congress provided.

The question is also *not* whether Congress created a survivorship action under DOHSA; Petitioners concede that it did not. If a common law survivorship action exists, as the Court inferred it does in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) and *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), it comes from the powers traditionally exercised by maritime courts to create rights and remedies according to the principles of common law, adjusted for the circumstances of the sea.

The real question presented is whether, by enacting DOHSA, Congress, without saying so, intended to preclude the maritime courts from exercising their traditional common law powers to create a remedy for the injuries sustained by a decedent prior to death. In other

words, the question is *not* whether pre-death damages may be recovered *under DOHSA* – everyone agrees they cannot – but whether DOHSA preempts maritime courts from developing a remedy, in favor of the estate of the decedent, for pre-death damages not addressed in DOHSA. The arguments in the opposing briefs are, for the most part, directed to the issue of whether it would be consistent with DOHSA's express provisions to allow recovery of damages of the kind sought, which is not what Petitioners seek. Therefore, much of their argument is irrelevant.

In order to demonstrate why Petitioners should prevail, it may be helpful to recast the issues into their proper configuration and to set forth a few points on which Petitioners believe there is no serious disagreement.

First, the *wrongful death* actions arising from this air disaster are governed by DOHSA. *Zicherman v. Korean Air Lines*, 516 U.S. 217 (1996).

Second, DOHSA operates only on the high seas, and deals only with wrongful conduct resulting in death. Thus, none of its limitations would apply if, by some miracle in this case, one of the passengers had survived, and brought a personal injury action against Korean Air Lines ("KAL"). Nor would DOHSA apply in a more typical maritime disaster (like a modern day *Titanic*) where some of the passengers survive a sinking vessel and the watery aftermath.

Third, DOHSA does not prevent the courts from developing common law wrongful death remedies for accidents occurring in territorial waters based on federal

maritime law principles (*Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970)) or on state law (*Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996)).

Fourth, DOHSA does not prevent the Court from developing new common law principles or applying existing laws to provide survivorship actions for maritime accidents not occurring on the high seas. Although this Court has never spoken directly on that issue, it has noted, without disapproval, in *Miles v. Apex Marine Corp., supra*, 498 U.S. 19, that many lower courts had concluded that the widespread adoption of federal and state survival statutes had dictated a change in the traditional general maritime law prohibiting survival actions. *Id.*, 498 U.S. at 34. Point I of Petitioners' opening brief made clear that, except possibly as to accidents on the high seas (the issue presented here), no federal law precludes the Courts from creating survivorship actions, except for claimants such as seamen and longshore and harbor workers who, because of their occupations, are covered by other specific statutes besides DOHSA.[1]

Fifth, survival action remedies and wrongful death remedies are different in nature and address mutually exclusive elements of damage. The survival action seeks recovery for losses suffered by the individual prior to his death; the death action is for losses suffered by the decedent's family after his death.

---

[1] The Jones Act, 46 U.S.C. § 688 (1988 ed.) for seamen and the Longshore Harbor Workers Compensation Act, 33 U.S.C. § 901 *et seq.* for longshoremen and harbor workers.

Sixth, although both Respondent and the United States avoid the issue as much as possible, the principle that they advocate would not be limited to the facts of this case in which the damages claimed are for approximately 12 minutes of pain and suffering. If adopted, the rule that they advance would apply whenever a person is injured by wrongful conduct on the high seas and eventually dies from the accident, no matter how long thereafter and no matter what the nature of the damages sustained. Under Respondent's and the Government's theory, both non-pecuniary damages (e.g., pain and suffering) and pecuniary damages (e.g., lost wages, medical expenses) would be precluded. There either is a survivorship action for pre-death injuries and their associated pecuniary and non-pecuniary damages, or there is not.

The only question remaining, then, is whether, if a general maritime survival action exists, may it be asserted in addition to a death action under DOHSA? Petitioners argue "yes" because there is no overlap with DOHSA remedies. A survival action does not encroach upon the scope of DOHSA's coverage. And there is no indication that Congress, in enacting DOHSA, intended to preclude the maritime courts from creating remedies under their traditional powers to formulate judge-made

law in admiralty matters in areas where Congress has not spoken.[2]

ARGUMENT

I. CALLING DOHSA "COMPREHENSIVE" LEGISLATION DOES NOT ANSWER THE QUESTION PRESENTED.

Much of the defense of the ruling below is based on the argument that DOHSA is "comprehensive" legislation and that the Courts are not free to alter it. Respondent's Opposition Brief at 10-28; Brief of *Amicus Curiae* at 6-26. Restating those arguments in traditional preemption terms, DOHSA "occupies the field," and the Courts are not free to change it. However, the critical question is: how is "the field" defined?

As both Respondent and the United States recognize (Respondent's Opposition Brief at 11, n.9, Brief of *Amicus Curiae* at 5), a wrongful death claim and a survivorship claim are not simply different ways of describing the same remedy. Wrongful death recovery, at least in DOHSA, is a remedy available to certain categories of relatives who will suffer after a person's death by reason

---

[2] It is curious that the Government puts its "oar into the water" with this issue as it admits that its liability in maritime matters is governed by the Suits in Admiralty Act, 46 U.S.C. App. § 741, *et seq.*; Public Vessels Act, 46 U.S.C. App. § 781, *et seq. See*, Brief of *Amicus Curiae* at 1. In this instance, the Solicotor General is not acting as the voice of the Executive Branch on policy issues, but as an interested party as the operator of ocean-going vessels.

of that death, typically by reason of loss of economic support. Under other statutes and general maritime law, wrongful death damages may be recovered for loss of emotional support (e.g., loss of society), which arise only after the death. *See, Sea-Land Services, Inc. v. Gaudet, supra,* 414 U.S. at 587, n.21.

By way of contrast, in a survivorship action, all of the injuries occur prior to death and have been sustained by the decedent. Because the claim is that of the decedent, which is carried forward after his death, it is irrelevant whether he has any heirs whom he is obligated to support. If the claim is successful, the money goes to his estate and is distributed along with his other assets, after payment of all the estate's expenses and debts.

These differences are important because they demonstrate that wrongful death and survivorship claims differ far more than in name only. There is no reason to believe that, when Congress provided for a wrongful death remedy under DOHSA, survivor claims were inevitably part of that same "field" and, hence, were precluded by DOHSA.

The legislative history cited by the Government does not, as it suggests, confirm that Congress intended to preclude a survival action. Brief of *Amicus Curiae* at 13-26. The debate on whether to enact a DOHSA-type statute lasted over a decade during which time the composition of Congress changed, as did the interests of the legislators. There are no clear and unequivocal statements of purpose or intent other than the language of DOHSA

itself, which is silent as to a survivorship action. If anything is clear from the legislative history it is that Congress wanted to provide a death action remedy. Thereafter, the debate was, in part, on whether to use as models the Lord Campbell's Act,[3] state death statutes, FELA,[4] or some other analogue. *Id.* at 16-18. Although Congress used Lord Campbell's Act somewhat as a model, the language of DOHSA as adopted does not contain the requirement contained in the Lord Campbell's Act that there exist an action that the decedent himself could have maintained as of the time of death, nor did DOHSA require an election of remedies either for injuries or for death, as did FELA. Since DOHSA contains neither the requirement nor the election, there are no statutory limitations which would preclude recovery in both the death action and a personal injury action. *See*, Petitioners' Brief on the Merits at 13-16. Therefore, the debate about what was or what was not available under state wrongful death statutes or under Lord Campbell's Act is just part of the process that Congress went through to decide the parameters of the death action it wanted to enact.

The other crucial point at issue in the Congressional debates was whether to legislate into territorial waters where states' laws had traditionally held sway. *See*, R. Hughes, *Death Actions in Admiralty*, 31 Yale L.J. 115, 118-21 (1921). Thus, the question arose whether a cause of action could be brought under both the federal statute and state wrongful death statutes. Brief of *Amicus Curiae*

---

[3] Lord Campbell's Act, 9 & 10 Vict., c.93 (1846).

[4] Federal Employer's Liability Act (FELA), 35 Stat. 65 (1908), as amended 46 U.S.C. §§ 51-60 (1988 ed.)

at 17-18. Congress decided not to extend coverage of DOHSA into territorial waters. It also decided to make it exclusive for the *death action* in the geographical area it covered such that there would be no separate action under state wrongful death statutes.

Furthermore, the colloquy between Mr. Stafford and Mr. Wm. Ezra Williams cited by the Government at page 19 only infers that Congress did not intend to include in DOHSA a recovery for the decedents' *heirs'* mental anguish and grief; the quoted discourse takes place in a discussion of what was "fair and just compensation" to the *heirs* under the proposed language of DOHSA. Whether or not the heirs can recover for grief as a result of the decedent's death says nothing about whether the estate can recover for the decedent's pre-death losses, both pecuniary and non-pecuniary.

The Government's further argument that witnesses who testified before Congress understood the legislation to be "the only right of action enforceable in this country for *death* resulting from negligence on the high seas" (Brief of *Amicus Curiae* at 20, emphasis added) only confirms what Petitioners conclude: that for *wrongful death* actions resulting from wrongful conduct on the high seas, DOHSA is the remedy.

Lastly, the Government's argument that DOHSA should be compared with FELA and its 1910 Amendment to provide a survivorship provision misses the point. The original FELA required an election either to recover for personal injuries or to recover for wrongful death. *Sea-Land Services, Inc. v. Gaudet, supra,* 414 U.S. at 582 n.9, citing *Seaboard Air Line R. Co. v. Oliver,* 261 Fed. 1, 2 (1919). The 1910 Amendment abrogated that election

requirement. DOHSA never contained such an election, so it cannot be said that Congress' retreat from that requirement in FELA was intended to infer that the Courts were precluded from developing a remedy not contained in DOHSA.

The fact that the Jones Act provides for both wrongful death and survivor actions also does not help Respondent. The Jones Act, like FELA and the Longshore and Harbor Workers Compensation Act, deals with the liability of an industry towards those whom it employs. Once Congress stepped in to legislate for an entire industry, it made great sense for it to take a comprehensive approach, much as it did for railroad workers in FELA,[5] so that all parties in that industry would know exactly where they stand, rather than leaving some parts up to the courts. But for deaths on the high seas, which are not limited to a single industry nor to an employer-employee relationship, the situation is very different. There is no organized groups of employees who are potential victims. Indeed, the coverage of DOHSA is not even limited to traditional maritime torts, as the submitted case graphically illustrates. Instead of an industry-specific law, DOHSA is an injury-specific law (death) and one that is limited to wrongful conduct in a limited location (the high seas). The logic that led to a comprehensive law for seamen and harbor workers has almost no relevance to the question of whether that approach should be followed under DOHSA. Instead, to decide whether the "field" of wrongful death was intended to include claims

---

[5] Indeed, Congress Incorporated FELA wholesale as the remedy for Jones Act seamen.

of survivorship, but to provide no remedy for them, it is necessary to employ the usual tools of statutory construction, a task to which we now turn.

II. DOHSA DOES NOT CONTAIN LANGUAGE THAT SUPPORTS PREEMPTION OF SURVIVORSHIP CLAIMS.

There is, of course, no preemptive language in DOHSA. To be sure, in 1920 there were no common law causes of action for survivorship, but there are other features of the Act that are consistent with Petitioners' views that Congress did not intend to preempt the claims at issue before the Court.

DOHSA was a rights-creating law, designed to mitigate what had come to be recognized by all as the harsh rules against common law claims for wrongful death believed to exist because of *The Harrisburg*, 119 U.S. 199 (1886). Congress clearly did not want a wrongdoer to escape all liability when his wrong caused the death of the victim. Following similar logic, why would Congress, as Respondent and the Government suggest, not only have deliberately disallowed claims of survivorship, but also intended to prohibit the maritime courts from devising their own remedies and thereby allowing the wrongdoer to escape responsibility for the pre-death harms that it had caused? Petitioners are aware of no such reasoning, and none of the legislative history cited by Respondent or the United States reveals any. The most that can be said is that Congress did not include such claims in DOHSA, just as it limited wrongful death claims under DOHSA to those occurring on the high seas but not in territorial

waters. In the latter situation, this Court rejected similar preemption claims in both *Moragne, supra,* and *Yamaha, supra,* and allowed the Courts to acknowledge common law claims that were outside the scope of DOHSA. It should do so here as well.

Respondent and the United States rely heavily on section 765 (46 U.S.C. App. § 765) which provides that a pre-death action brought for personal injuries "may" be converted into a wrongful death action if the victim dies. Since there were no claims based on survivorship in 1920, that approach is consistent with a rights-granting view of the Act, but is not inconsistent with the possibility that a survivorship claim might exist alongside of the DOHSA wrongful death claim. The 1920 statute of limitations (the now-repealed 46 U.S.C. § 763) began to run from the date of the wrongful act, so that if a person lived more than two years, the DOHSA claim would be barred, but for section 765. Petitioners do not contend that section 765 must be explained solely on that basis, but it is surely a plausible explanation and, thus, Respondent's charge (Respondent's Brief at 23) that Petitioners have rendered section 765 a nullity is misguided.

On the other side, there is 46 U.S.C. App. § 763(a), added in 1980, ten years after this Court decided *Moragne*. The new section establishes a three year statute of limitations for all maritime torts arising from the time that tort accrues. The section specifically recognizes the possibility that maritime torts can give rise to "a suit for recovery of damages for personal injury or death, or

both"[6] – precisely the situation here. Although 46 U.S.C. App. § 763(a) covers more than torts occurring on the high seas, Congress chose to insert this provision in the same place in DOHSA as had been the prior statute of limitations for DOHSA, which Congress repealed in the same law. Petitioners believe that section 763(a) is a strong indication that, if Congress ever intended to preempt survivorship claims, it revoked that intention in 1980 and left the courts free to continue on the path begun in *Moragne*. At the very least, sections 765 and 763(a) cancel each other out on the issue of preemption, leaving Respondent and the United States with only the fact that the rights set forth in DOHSA are different from those in a typical survivor claim. However, that difference merely establishes the question, since without those differences there would be no issue. In order to answer it, we turn to the one rule of law which Respondent and the United States do not discuss: the presumption against preemption.

---

[6] The legislative history of § 763(a) refers to the Jones Act, which provided for both kinds of remedies and already had a three year statute of limitations; DOHSA, which previously had a two year statute of limitations from the date of the wrongful conduct; and general maritime law, which was not discussed as either inclusive or exclusive of both kinds of remedies, but which had no defined statute of limitations, rather, was governed by the common law equitable doctrine of laches. *See*, 126 Cong. Rec. 3303-3306 (1980).

III. THE PRESUMPTION AGAINST PREEMPTION CONFIRMS THAT SURVIVORSHIP CLAIMS ARE NOT ELIMINATED BY DOHSA.

Respondent and the United States can barely manage to include the word "preemption" or any of its derivatives, anywhere in their briefs. Yet, there can be no doubt that theirs is a preemption argument since it is allegedly the passage of DOHSA that is the sole barrier to Petitioners' right to sue for the pain and suffering sustained by their decedents. The reason why they are so reluctant to discuss this case in preemption terms is that there is a very strong presumption against preemption of common law remedies through all areas of the law.

Preemption can be either express or implied. *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992), citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In the instant case, there is no express preemption in DOHSA of survival actions. However, even in express preemptive statutes, the Courts must inquire into the scope of the law which Congress intended to invalidate, *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2250 (1996), by looking at Congressional purpose as defined by the language of the statute and the statutory framework, *id.* at 716, citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530 n.27 (1992). It is clear, however, that there is no express Congressional language in DOHSA invalidating the maritime courts from developing common law survival actions.

Although *Medtronic, supra*, addressed express preemptive provisions, its reasoning as to why the Court should not preempt common law claims is applicable

here. The issue in *Medtronic* was whether preemptive language in the Medical-Device Amendments of 1976[7] was intended to preempt state common law negligence and products liability claims. In holding that common law claims were not preempted, the Court noted that it would be "difficult to believe that Congress would, without comment, remove all means of judicial recourse[8] for those injured by illegal conduct," 116 S. Ct. at 2251, citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). Similarly, if Respondent's and the United States' approach is followed, there will be no judicial recourse to recover for pre-death injuries occurring from wrongful conduct on the high seas to non-seafarers.

Prior cases by this Court have evidenced a reluctance to preempt common law causes of action even where the statute at issue contained some preemption language. *See*, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524-30 (1992) which permitted Petitioner to maintain some common law actions using theories of the case that did not run afoul of the preemption statute. *See also, Conrail v. Gottshall*, 512 U.S. 532, 534 (1994) in which the Court noted that, unless common law principles were expressly rejected by FELA, common law is accorded great weight in the Courts' analysis and, where the statute is silent on the issue, common law principles must be applied. Where, as in DOHSA, there is absolutely no preemptive

---

[7] Federal Food, Drug and Cosmetic Act, § 513(a)(1)(A,B,C), as amended 21 U.S.C.A. § 360c(a)(1)(A,B,C) and § 360k(a).

[8] The Act did not provide for a private right of action under the statute itself, 116 S. Ct. at 2250, so any judicial recourse had to come from the common law claims.

language, the Court should be wholly reluctant to displace the common law survival action remedy for pre-death injuries.

Under implied preemption principles, federal law only preempts state law (statutory or common law) if Congress evidences an intent to occupy the field or, if the entire field is not occupied, federal law preempts state law where the state law conflicts with the federal law or is an obstacle to accomplishing the objectives of the federal enactment. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249 (1984), citing *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Common*, 461 U.S. 190, 203-04 (1983); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See also, Medtronic, supra*, 116 S. Ct. at 2249-50.

In neither the express language of DOHSA or the legislative history is there a clearly articulated purpose of Congress to occupy the field of survivorship claims for pre-death injuries where the wrongful conduct occurs on the high seas. Nor does a general maritime law survival action conflict with DOHSA, which addresses death remedies. Nor would recognition of the survivorship remedy conflict with the objectives of DOHSA. To the contrary, it would complement the objectives of DOHSA by holding the wrongdoer responsible for the injuries his wrongdoing inflicts. This is particularly true since there is no federal policy of denying an estate the right to recover damages sustained by a decedent or of giving a wrongdoer a windfall where the victim eventually dies from the

wrongful conduct. Thus, even without the strong presumption against preemption, there is no basis for inferring an intent to preclude the remedy sought here.

IV. THE SURVIVAL REMEDY COVERS ALL PRE-DEATH INJURIES.

This Court's decision acknowledging or rejecting a survivorship remedy for pre-death injuries to non-seafarers will apply to all pecuniary (e.g. loss of earnings, medical expenses) and non-pecuniary (e.g. pain and suffering) damages sustained as a result of wrongful conduct on the high seas that ultimately leads to the victim's death. If the injured individual survives sufficient time to incur lost wages and medical expenses and is unable to recover for those losses in a personal injury action before his death, such damages will not be recoverable under the pecuniary loss provisions of DOHSA, section 762. As Respondent and the United States repeatedly emphasize (Respondent's Brief at 16; *Amicus Curiae* Brief at 3), section 761 limits those who may sue under DOHSA to the "decedent's wife, husband, parent, child, or dependent relative," and section 762 provides for their recovery but only of "the pecuniary loss sustained by [them] . . . in proportion to the loss they may have suffered by reason of the death of the [decedent]." As this Court's decision in *Zicherman* made clear, those losses are principally for loss of economic support to which they would have been entitled.

In these days of extraordinary medical advances, there is an ever-increasing likelihood that a person seriously injured may survive several years before dying of

his injuries and, in that time, earn none of his salary and incur huge medical and other expenses. If the survivorship claim is wiped out, as Respondent urges, all of those pecuniary losses would be unrecoverable, as would be damages for pain and suffering. But because those losses were sustained by the decedent and not "sustained by the persons for whose benefit the suit is brought" as section 762 requires, the defendant would reap a huge windfall unless the personal injury claim could be resolved before the accident victim died.

Moreover, if the decedent incurred large expenses for his medical care, but did not pay them, hoping to use his tort judgment for that purpose, those debts would remain to be paid by his heirs, but with no money from the wrongdoing defendant to satisfy them. Whatever Congress may have had in mind in 1920 when it passed DOHSA, there is absolutely no evidence that it intended to foreclose the traditional capacity of maritime courts to provide relief in such a situation, yet that is the inevitable result of Respondent's position and that of the United States.

CONCLUSION

For all of the foregoing reasons and for those set forth in Petitioners' Brief on the Merits, the decision of the Court below should be reversed and the cases remanded to the district court for further proceedings.

Dated: Tuesday, April 7, 1998

Respectfully submitted,

JUANITA M. MADOLE
SPEISER KRAUSE
One Park Plaza, Suite 470
Irvine, California 92614
(949) 553-1421

Attorney for Petitioners

and

ALAN MORRISON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.E.
Washington, D.C. 20009
(202) 588-7720

Of Counsel